83-1915

CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

The Kohn Beverage Company

Petitioner

v.

Teamsters Local No. 348

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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21 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes	Page
Section 2711.10 Ohio Revised Code	5, 6, 18, 20
Section 2711.10 (D) Ohio Revised Code	5

STATEMENT OF THE CASE

On or about September 2, 1981, the employer, KOHN BEVERAGE COMPANY, summarily terminated approximately 30 employees for their alleged participation in an unauthorized work stoppage. Grievances were subsequently filed and as required through Article VIII of the collective bargaining agreement, arbitrators were mutually selected and agreed upon between the parties to arbitrate the subject grievances. Arbitration hearings were subsequently scheduled and held concerning the first five days of the discharged employees' grievances. At each of the five arbitration hearings, two issues were presented to the arbitrators for their determination. The first issue presented was whether or not the grievances were timely filed and, therefore, arbitrable,

while the second issue was based upon the merits as to whether or not the grievants' discharge was reasonable under all the circumstances. At each of the hearings, both parties were permitted to fully present their cases and did present witnesses, exhibits, and other evidence pertinent to each particular case. In addition, extensive post hearing briefs were filed in each of the five cases by both of the parties involved.

In the cases which are the subject of the within appeal, decisions were rendered on April 22, 1982, April 30, 1982 and July 1, 1982. An examination of the three opinions, which are the subject of the present case, will show that in each decision the arbitrators found that the discharge of the particular grievant was not reasonable under all the circumstances and ordered the grievants immediately restored

to their employment without loss of seniority. The Company, from the date of each of the awards, steadfastly refused to reinstate said grievants to their position with the Company. The Company subsequently filed to have the three arbitrators' decisions vacated and the Union, in turn, counterclaimed to have the arbitrators' decisions confirmed and for back pay from the date the grievants should have been reinstated to their employment.

On May 12, 1983, the Trial Court granted a summary judgment on behalf of the Union in regard to all three grievants, finding that the decisions of the arbitrators reinstating the grievants to their positions should be affirmed.

The Trial Court's decision to confirm said awards was affirmed by the Ninth District Court of Appeals on October 5, 1983 and the Supreme Court of Ohio refused to review the

case on September 1, 1984. It is from the decision of the Supreme Court of Ohio that the KOHN BEVERAGE COMPANY has now petitioned this Court to grant a Writ of Certiorari.

REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI

Section 2711.10 of the Ohio Revised Code as interpreted and applied by the Courts of Ohio does not conflict with Article I, Section 10 of the Constitution of the United States. In Petitioner's argument in support of its Writ for Certiorari, it contends that Section 2711.10 of the Ohio Revised Code does not provide for the situation wherein arbitrators' awards go completely against the specific language intent and purpose of the collective bargaining agreement.

A review of said statute clearly indicates under 2711.10(D) "Courts shall make orders vacating arbitrator's awards if the arbitrators exceeded their powers, or so imperfectly exceeded them that a mutual, final, and definite award upon the subject matter submitted was not made."

Although it is clear that the aforementioned statute specifically allows vaca-

tion of arbitration awards where the decision is contrary to the bargained for agreement, it is submitted that in the present case, all three of the arbitrators' decisions were in conformance with the authority granted by the collective bargaining agreement.

In its argument, Petitioner has cited numerous labor arbitrator decisions and labor board decisions regarding no strike clauses. As the Court is certainly aware, these decisions have absolutely no relevance or bearing whatsoever to the present case which is an action to confirm or vacate an arbitrator's award under Section 2711.10 of the Ohio Revised Code.

All of the labor arbitration cases and Board cases which are cited by the Plaintiff concern situations no different than the three decisions which are the basis of the instant case wherein arbitrators have made decisions whether or not there were

violations of a particular no strike clause and whether the Company's discipline was in accordance with the language of the collective bargaining agreement. In none of the cases cited by the Petitioner in its argument was the contract language in regard to the arbitrator's authority in the event of a discharge and also the language of the no strike clause identical with the language in the present contract. It is obvious that unless the language in the collective bargaining agreement, wherein the arbitrator gains his authority, is exactly the same, there is absolutely no relevance on other arbitration decisions. It is submitted that for every labor arbitration decision cited by Petitioner wherein a violation of a particular no strike clause was found under a particular set of facts, there is a like decision wherein an arbitrator has not found a violation of a certain

no strike clause under a certain particular set of facts. For a clear example of this, this Court is directed to the three decisions in the instant lawsuit wherein the arbitrators decided in favor of the grievants and not the Company. In the case which Petitioner cites as controlling: Local 342 of the United Automobile, Aerospace, and Agricultural Implement Workers of America (U.A.W. AFL-CIO v. T. R. W., Inc., 402 F. 2d 727, the contract language relating to arbitrator's authority and to no strike clauses was different from the present case. There was no language insisting that the Company's disciplinary action in regard to an unauthorized work stoppage must be reasonable under all circumstances as is the actual language in the present case. In addition, said case is further distinguishable upon its facts in that in the above case the employees who were dis-

charged were active ringleaders of an unauthorized strike which was not the case of the three employees involved in the present case.

Two (2) other court cases are cited by Petitioner in its argument. The first of said case is United Mine Workers of America v. Chris Craft Corp., 38 F. Rep. 2d 946. In its argument, Petitioner has attempted to show that the above case held that a Union is not entitled to compel arbitration of discharges of employees who admit that they participated in an unauthorized work sotppage. Petitioner cites Section 5.8 of the Contract but very conveniently failed to cite the entire article. The language Petitioner did not cite is as follows:

> "...Any violation of the foregoing provisions may be made the subject of disciplinary action including discharge, and such action may not be raised as a grievance under this

Agreement."

Clearly the reason the Court held that the discharges in the above case would not be arbitrated was because the parties' contract specifically forbid arbitration in said circumstances. The ruling in the above case only pertained to that particular case as a result of the language contained in the parties' collective bargaining agreement. It was not a general statement as to the procedure concerning discharge in all work stoppage cases. In the present case, the parties' contract contains no such language forbidding arbitration, but quite to the contrary, provides for arbitration for all discharges.

In the final case cited by the Petitioner, Amanda Bent Bolt Co., v. International U. U. A. A. A. I. W., 451 F. 2d 1277 (6th Cir. 1971), the contractual language again is totally different from the contractual

language contained in the present case. The express language in the Amanda case allowed the Company to discharge striking employees which is totally different from the language in the present case which allows the Company to discipline as is reasonable under all circumstances. In none of the cases cited by the Petitioner in its argument is the contract language regarding discipline as to an illegal work stoppage identical to the present contract. Therefore, rulings made in these cases are neither controlling or relevant to the present case.

Since the parties, through their agreement, can grant arbitrators more or less power in regard to discipline for unauthorized work stoppages, it is imperative that the actual language of the parties' current agreement is closely scrutinized. Article VIII, Section 2 of said Contract states as follows:

"Section 2: Arbitration: Should any such grievance or difference remain unsettled after exhausting the aforementioned procedure, either party hereto, and only either party, shall, if the party desires, demand arbitration by written notice to the other party within five (5) working days after failing to settle the grievance as outlined in paragraphs two (2) of STEP 3. The arbitrator shall be appointed by mutual consent of the parties. If the parties are unable to agree upon an arbitrator within seven (7) working days after arbitration is invoked, then either party may request the Federal Mediation and Conciliation Service to provide a list of five (5) qualified arbitrators, and the parties shall select a single arbitrator for such list. The decision of such arbitrator shall be final and binding upon the Company, the Union and its members and employees involved. The arbitrator shall not be empowered to rule contrary to, to amend, or to add to, or to eliminate any of the provisions of this Agreement and the practices which the parties have developed under this Agreement. In case of a discharge or disciplinary layoff grievance, the arbitrator shall have the power to return the grievant to his employee status with or without restoration of back pay, or mitigate the penalty as equity suggests under the facts. Expenses incident to the services of the arbitrator shall be borne equally

by the parties hereto.

> "It is further agreed that the above Grievance-Arbitration Procedure shall be and the same hereby is the sole method of settling disputes hereto or between the employee and the Employer and it is further agreed that the Employer, the Union, and the employees covered hereunder shall be bound by any such decisions, determinations, agreements or settlements which may be effectuated pursuant to invoking the Grievance-Arbitration Procedure. If any Employer refuses to arbitrate any grievance, the Union shall have the right to strike.

There is no dispute that each of the three arbitrators was selected and appointed by mutual consent of the parties to hear and decide the grievances in accordance with the collective bargaining agreement. Further, the above section gave the arbitrator the authority and power, since each case was a discharge grievance, to return the grievant to his employee status with or without restoration of back pay or mitigate the penalty as equity suggests under the sections. Since the discharges

stemmed from an alleged participation in an unauthorized work stoppage, an examination of Article XXIII is necessary since it involves the contractual authorization concerning discipline for unauthorized work stoppages and the arbitrator's powers in such a case.

Article XXIII states that:

> "...It is further agreed that in all cases of an unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized act of its members. It is further agreed that the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above. The employer in such unauthorized action shall retain its rights to engage in such disciplinary action with reference to such unauthorized acts as is reasonable under all circumstances."

It must be noted that there is no question the arbitrators had the power to determine discharge cases in accordance with

Article XXIII, but also that they had the power to apply the above section concerning unauthorized strike when they determined the issue of whether or not the Company's disciplinary action concerning said strike was reasonable under all circumstances. This was the issue that was before them and the above is the applicable Contract language in regard thereto. An examination of each of the three arbitral decisions clearly reflects that the arbitrators relied strictly upon the language contained in this action and made their decisions accordingly.

Although it is obvious in the instant case that each arbitrator had the authority to determine the issues which he ruled upon, the Courts are extremely reluctant to vacate arbitration decisions even when the Court couldn't determine from the arbitrator's opinion whether the arbitrator had exceeded his powers or not. In the case of Goodyear

Tire and Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America, 42 Ohio St. 2d 516 (1975), Goodyear Tire and Rubber Co. sued to vacate the arbitrator's award on the grounds that the arbitrator exceeded his authority. In the Court's decision affirming the award, the Court stated that it did not find that the arbitrator exceeded his powers just because his decision was ambiguous and that he might have exceeded his powers. The Court, in its opinion, followed the strict provisions of the Ohio Revised Code Section 2711.10, whereby judicial review is limited to findings of "fraud, corruption, misconduct or that the arbitrator exceeded his authority." The Court in said case borrowed the language of United Steel Workers of America v. Enterprise Wheel and Car Court, 363 U. S. 593 (1960), wherein it was stated that an arbitrator's authority

is limited to that granted him by the contracting parties and his award is legitimate only so long as it draws its essence from the collective bargaining agreement. In the present case, there was absolutely no ambiguity in the three arbitrators' decisions and all three decisions clearly derive their essence in the powers granted them by the collective bargaining agreement.

In addition to the above, Courts have been, in general, extremely reluctant to vacate arbitrator's awards when the parties have agreed to resolve the dispute through said arbitral process. This has been true in Ohio from the very beginning. In an early Ohio case titled Corrigan v. Rockefeller, 67 Ohio St. 354 (1900), the Court in upholding the finding of the arbitrator stated as follows:

> "Courts construe the act of arbitrators with liberality, and with an inclination to support arbitration

> where substantially regular, and that an award covering the issues, made in good faith upon a full hearing, and in obedience to the submission, is final." (p. 368)

There can be no dispute that the Petitioner, KOHN BEVERAGE COMPANY, was freely permitted to enter into and enforce the terms of its collective bargaining agreement. Had the Courts found that the arbitrators exceeded the powers granted them in the collective bargaining agreement and not followed the terms of said agreement, they were empowered under Section 2711.10 of the Ohio Revised Code to vacate said awards.

CONCLUSION

It was clearly shown that (1) each arbitrator was mutually selected and agreed upon by the parties; (2) that a full and fair hearing was held in each of the three cases including post hearing briefs; (3) each arbitrator had the authority granted by the contract in Article VIII, Section 2, to return the grievant to his employee status with or without restoration of back pay or to mitigate the penalty as equity suggests under the facts in case of discharge; (4) each arbitrator had the authority to determine whether or not the employer engaged in both disciplinary action with reference to such unauthorized acts as was reasonable under all circumstances and was granted said authority by Article XIII of the parties' collective

bargaining agreement, (5) that the parties, through their collective bargaining agreement under Article VIII, Section 2, agreed that they would be bound by the decision of the arbitrator; (6) that none of the cases cited by the Petitioner as controlling had either the identical factual circumstances or identical contract language with regard to arbitrator's authority or in regard to no strike clauses; and (7) that each arbitrator clearly had the authority to render the decision and did so in a very competent manner.

Section 2711.10 of the Ohio Revised Code allows the vacation of arbitrators' awards in the event said arbitrators exceeded the power granted to them through the power granted to them through the parties' agreement or imperfectly executed said powers. In the present case, it has been shown that each arbitrators' award

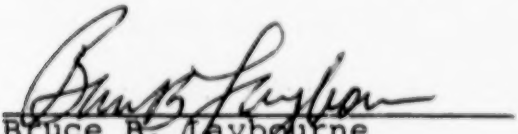
was well within the contractual powers granted.

The within case is clearly not one which contains an improper question of Federal Law. Rather, it is only a case wherein arbitrators' awards were rendered in full accordance with the collective bargaining agreement between the parties after a full and fair hearing was held. The matter has been reviewed by the Trial Court, the Ohio Ninth District Court of Appeals, and the Ohio Supreme Court and all Courts have determined that said awards were made and entitled to confirmation.

Based upon the above, it is respectfully submitted that the Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

LAYBOURNE, SMITH,
OBERDANK, GORE AND
SHAPIRO CO., L. P. A.



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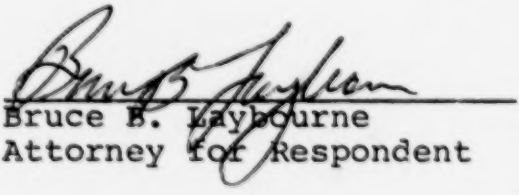
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States has been mailed by regular U. S. mail to Harry A. Tipping, 300 Centran Building, Akron, Ohio 44308, attorney for Petitioner, this 31st day of May, 1984.



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